No. 88-1782

Supreme Court, U.S.
FILED
MAY 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

KEVIN L. BROWN
SPECIALIST, UNITED STATES ARMY, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTIONS PRESENTED

I

WHETHER A CUSTODIAL SUSPECT'S REQUEST TO POLICE TO SPEAK TO THE PROSECUTING ATTORNEY "IN PRIVATE" AND "AS A LAWYER" CONSTITUTED AN UNAMBIGUOUS REQUEST FOR COUNSEL, THEREBY REQUIRING INTERROGATION TO CEASE.

II

ASSUMING, *ARGUENDO*, THAT THE SUSPECT'S ABOVE REQUEST CONSTITUTED AN AMBIGUOUS REQUEST FOR COUNSEL, WHETHER INTERROGATORS HAD A DUTY TO CEASE INTERROGATION, OR TO CEASE INTERROGATION EXCEPT TO THE EXTENT NECESSARY TO CLARIFY THE AMBIGUOUS REQUEST.

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THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Kevin L. Brown, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The Court of Military Appeals affirmed the decision of the Army Court of Military Review by order dated March 9, 1989. The order granted review and summarily affirmed the Army court's decision (Appendix A). The opinion of the Army Court of Military Review appears at 27 M.J. 614 (A.C.M.R. 1988) (Appendix B).

JURISDICTION

The Court of Military Appeals entered a judgment on March 9, 1989 affirming petitioner's conviction. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. II. 1984).

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States provides:

> Amendment V: "No person . . . shall be compelled in any criminal case to be a witness against himself."

Statement of the Case

Contrary to his plea, petitioner was convicted by a general court-martial of rape.[1] The issue granted by the United States Court of Military Appeals, satisfying a prerequisite to this Court's jurisdiction, was as follows:

> WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY ADMITTING INTO EVIDENCE, OVER APPELLANT'S OBJECTION, A CONFESSION OBTAINED IN VIOLATION OF APPELLANT'S FIFTH AMENDMENT RIGHTS.

Disposition of that issue by the Court of Military Appeals is shown in its order at Appendix A.

Statement of Facts

Around 7:00 a.m. on September 12, 1987, petitioner was arrested as a suspect for the rape of Mrs. Ingrid Reed (R. 78). Petitioner was advised of his rights and made an exculpatory sworn statement (Pros. Exh. 11). The police released petitioner at approximately 5:30 p.m. (R. 314).

Petitioner was again arrested and taken to the police station for further questioning at approximately 7:00 p.m. that same day. At the police station, Special Agent Gunther[2] introduced petitioner to Captain Spiece, an attorney, as "a prosecutor for the United States Army . . . assisting the CID in this investigation" (R. 62).[3]

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[1] A violation of the Uniform Code of Military Justice [hereinafter cited as U.C.M.J.], Article 120, 10 U.S.C. § 920 (1982).

[2] A special agent is a plainclothes criminal investigator who is in the military and who works for the Criminal Investigation Command [hereinafter "CID"]. The Criminal Investigation Command is the criminal investigation arm of the United States Army.

[3] When asked during the suppression motion whether he realized Captain Spiece was a prosecutor, petitioner testified that "I knew you was (sic) an

Petitioner sat in the interrogation room with Special Agent Gunther and Captain Spiece. Special Agent Gunther testified that petitioner asked for permission to speak "in private" with Captain Spiece "as a lawyer," and "in a capacity as an attorney" (R. 51, 54, 62-63). Captain Spiece and petitioner met in private (R. 63). After Captain Spiece spoke privately with petitioner, Captain Spiece reported to Special Agent Gunther the content of the meeting. Special Agent Gunther recalled Captain Spiece's report, as follows:

> JUDGE: You say– she [Captain Spiece] said Brown wanted to talk to her as a lawyer?
>
> WIT: Yes, she – he requested to talk to Captain Spiece in private and she sent me out of the room and she was there for seconds or maybe a minute and came out and said he wanted to talk to her as a lawyer and she refused to do it, advised him that she was a prosecutor and she left the room and said that he could talk to a lawyer but it could not be her.

R. 51.

> WIT: He [petitioner] verbalized to me in the room with Captain Spiece . . . said that he wanted to talk to Captain Spiece in private and she said – I said okay, we'll leave and she said would you please leave. We walked out – out the end of the hallway. We closed the door. We were out probably 10, 15, 20 seconds and Captain Spiece came out said that he wanted to talk to – wanted to ask her some advice and she advised him that she would not do that.

R. 63.

Petitioner was not read his rights until he had met in private with Captain Spiece, and Captain Spiece related to Special Agent Gunther the content of the meeting. There

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attorney, but as far as being a prosecutor or a defendant (sic) wasn't really clear" (R. 88). Petitioner's intelligence level is below average, as reflected by his G.T. score of 82 (a standard of measuring intelligence roughly equivalent to I.Q.).

was no effort to clarify petitioner's request to speak with a lawyer (R. 54-56). Special Agent Gunther immediately began the interrogation which produced the confession (Pros. Exh. 2).

Petitioner's confession was the critical evidence in the government's case. There were no witnesses to the alleged rape, other than Mrs. Reed, who could not identify petitioner.

Petitioner litigated this constitutional question at every stage of the proceedings. At trial, the defense counsel moved to suppress the confession. The trial judge held that petitioner's request to speak with Captain Spiece did not constitute a request for counsel, and admitted petitioner's confession into evidence (R. 104-05). On appeal to the Army Court of Military Review and the Court of Military Appeals, petitioner unsuccessfully argued that the military judge erred in admitting his confession.

REASONS FOR GRANTING THE WRIT

I. THE DIFFICULTY THAT COURTS HAVE IN RESOLVING BASIC, YET CRITICAL, QUESTIONS OF WHEN AND TO WHAT EXTENT AN INDIVIDUAL HAS INVOKED THE FIFTH AMENDMENT RIGHT TO COUNSEL THREATENS TO ERODE THE PROPHYLACTIC EFFECT OF *MIRANDA V. ARIZONA*.

The decisions of the trial and appellate courts below misapply the principles announced in *Miranda v. Arizona*, 384 U.S. 436 (1966), *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Smith v. Illinois*, 469 U.S. 91 (1984). The decisions below echo difficulties other courts experience in applying basic fifth amendment protections.[4] The prophylactic effect of *Miranda* is thus eroded.

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[4] *See, e.g.*, Smith v. Endell, 860 F.2d 1528 (9th Cir. 1988) (the Alaska state courts found no invocation of the right to counsel; the United States Magistrate found a conditional and ambiguous request for counsel; the Ninth Circuit reversed, finding a clear request for counsel which required

This Court has adopted a bright-line rule to protect a suspect's fifth amendment right against self-incrimination while in custodial interrogation. Police must advise a suspect of the right to remain silent and the right to the presence of an attorney. *Miranda*, 384 U.S. at 479. When a suspect in custody requests to speak to counsel, police must cease interrogation until an attorney is present. *Edwards*, 451 U.S. at 484-485. Questioning may not then resume unless interrogators comply with the request or the suspect himself initiates further communication or knowingly and intelligently waives the right previously invoked. *Smith*, 469 U.S. at 94-95. The purpose of this prophylactic rule is to "erect an auxiliary barrier against police coercion" which could impinge upon an individual's right to choose between speech and silence. *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987).

Petitioner's case reflects the difficulty courts have in properly applying fifth amendment guidance. The Army court held that petitioner did not invoke his right to counsel and, therefore, interrogation did not have to cease. The Court of Military Appeals, without formal opinion, concurred with the Army court.

First, the courts below missed the focus of inquiry: "whether [the] accused 'expressed his desire'-for, or 'clearly asserted' his right to, the assistance of counsel" (*Smith v. Illinois*, 469 U.S. at 95, *quoting Edwards*, 451 U.S. at 484-485) or "whether [the] accused 'indicate[d] in any manner

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interrogation to cease; Judge O'Scannlain, dissenting, felt the accused never invoked his right to counsel); Griffin v. Lynaugh, 823 F.2d 856 (5th Cir. 1987), *cert. denied*, __ U.S. __, 108 S.Ct. 1059 (1988) (the District Court found a general invocation of the right to counsel followed by a waiver; the Fifth Circuit affirmed, holding the accused made an unambiguous limited request for counsel which interrogators respected, so waiver was not an issue; Judge Rubin, dissenting, felt that the court destroyed the "antiseptic effect" of *Edwards* and *Barrett* because Griffin's invocation was general, or at worse, ambiguous); Dunkins v. Thigpen, 854 F.2d 394, 396-98 (11th Cir. 1988), *cert. denied*, __ U.S. __, 109 S.Ct. 1329 (1989) (unsure as to whether the accused's statement that "[b]efore I talk anymore now, I would like to talk to my lawyer or either my mama or somebody . . ." invoked the right to counsel the court disposed of the case on another basis).

and at any stage of the process that he wish[ed] to consult with an attorney before speaking' " (*Smith v. Illinois*, 469 U.S. at 95, *quoting Miranda*, 384 U.S. at 444-445).

Second, the courts below failed to analyze petitioner's "request for counsel or the circumstances leading up to the request" (*Smith v. Illinois*, 469 U.S. at 98). *Petitioner's request, according to his interrogator, was to speak to Captain Spiece "in a capacity as an attorney," "in private," and "as a lawyer"* (R. 51, 54, 61-63) (emphasis added). The Army court sidestepped the clear wording and intent of petitioner's request, and restated it as a the request "to talk to Captain S, the command prosecutor" or "to speak to a prosecuting attorney." *Brown*, 27 M.J. at 616, 617. The court also held that petitioner's request, though from one with a low intelligence level, was limited "and will not be broadly interpreted as an invocation of the right to counsel." *Brown*, 27 M.J. at 616.

Third, the heavy reliance below on *Barrett* was misplaced. *Barrett* teaches that in interpreting a request for counsel, the inquiry is what "ordinary people" attaching "ordinary meaning[s]" would understand the request to mean.

Petitioner simply sought advice from the nearest lawyer, thinking she was someone who could help as a lawyer. Petitioner stated a desire to consult with an attorney, in private, and for legal advice. The police and the prosecuting attorney effectively frustrated petitioner's desire to obtain that advice. The government officials in this case coerced petitioner into giving a statement by ignoring petitioner's right to counsel. The government officials successfully by-passed the barrier against police coercion erected in *Miranda*, and, therefore, unlike in *Barrett*, a constitutional objective will be served by suppression.

II. THIS CASE PROVIDES THE COURT A UNIQUE OPPORTUNITY TO RESOLVE THE LONG-STANDING CONFLICT IN THE CIRCUITS AS TO THE PERMISSIBLE LIMITS OF INTERROGATION FOLLOWING AN AMBIGUOUS REQUEST FOR COUNSEL.

Assuming petitioner's request for counsel is found to be ambiguous, what permissible limits of interrogation follow such a request? This Court has recognized that "courts have developed *conflicting standards* for determining the consequences" of ambiguous or equivocal requests for counsel. *Smith v. Illinois*, 469 U.S. at 95-96 (emphasis added). Petitioner's case provides an opportunity to settle the conflict among competing federal standards of review.

Lower courts have developed, as recognized in *Smith v. Illinois*, three standards for determining the consequences of an ambiguous or equivocal request. *Smith v. Illinois*, 469 U.S. at 96 n.3. Some courts require all questioning to cease even if the request for counsel is ambiguous or equivocal. Petitioner submits that this standard reinforces the purposes of *Miranda*, *Edwards*, and *Smith*. *Magilo v. Jago*, 580 F.2d 202, 205 (6th Cir. 1978). Other courts allow interrogation to continue solely for the purpose of clarifying the accused's desire for counsel. *United States v. Porter*, 776 F.2d 370 (1st Cir. 1985), *cert denied*, 481 U.S. 1048 (1987); *Terry v. LeFevre*, 862 F.2d 409, 412 (2d Cir. 1988) (*citing United States v. Gotay*, 844 F.2d 971, 975 (2d Cir. 1988)) ("when a suspect makes an equivocal statement that arguably can be construed as a request for counsel, interrogation must cease except for narrow questions designed to clarify the earlier statement and the suspect's desire for counsel"); *United States v. Riggs*, 537 F.2d 1219, 1222 (4th Cir. 1976) (". . . where a suspect makes a statement which arguably amounts to an assertion of his Miranda rights and the interrogating agent recognizes that the statement is suspectible of that construction, . . . he should then inquire of the suspect as to the correct interpretation of the statement"); *United States v. Cherry*, 733 F.2d 1124, 1130-31 (5th Cir. 1984), *cert. denied*, 479 U.S.

1056 (1987); and *United States v. Fouche*, 776 F.2d 1398, 1405 (9th Cir. 1985), *aff'd* 833 F.2d 1284 (9th Cir. 1987), *cert. denied*, __ U.S. __, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988) ("agents were immediately required to cease all questioning except that necessary to clarify [the] equivocal request"). The Army Court of Military Review has adopted this second standard. *United States v. Whitehead*, 26 M.J. 613 (A.C.M.R. 1988). Still other courts have adopted a third approach of defining a "threshold standard" of clarity which would trigger the right to counsel. *People v. Krueger*, 412 N.E.2d 537 (Ill. 1980), *cert. denied*, 451 U.S. 1019 (1981).

Petitioner's case provides the Court a precise factual opportunity to address this threefold conflict.

CONCLUSION

The questions presented are substantial and of constitutional significance because misapplication of basic fifth amendment principles threatens to erode the prophylactic effect of *Miranda* and *Edwards*. Furthermore, the questions presented address a conflict among federal courts which have established differing standards to address an interrogator's duty once a suspect makes an ambiguous or equivocal request for counsel. This issue was left unresolved by this Court in *Smith v. Illinois*.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 61518/AR
CMR Dkt. No. 8702907

UNITED STATES, APPELLEE

v.

KEVIN L. BROWN (204-48-3190), APPELLANT

ORDER

On consideration of the petition for grant of review of the decision of the United States Army Court of Military Review, we conclude that the decision below correctly resolved the issue before that court, for the reasons stated therein. 27 M.J. 614. Accordingly, it is by the Court this 9th day of March, 1989

ORDERED

The said petition is hereby granted on the Issue raised by appellate defense counsel; and

That the decision of the United States Army Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

APPENDIX B

U.S. ARMY COURT OF MILITARY REVIEW

ACMR 8702907

UNITED STATES, APPELLEE

v.

SPECIALIST KEVIN L. BROWN, 204-48-3190,
UNITED STATES ARMY, APPELLANT

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28 Oct. 1988.

For Appellant: Major Kathleen A. VanderBoom, JAGC, Captain Gregory B. Upton, JAGC (on brief).

For Appellee: Colonel Norman G. Cooper, JAGC, Major Gary L. Hausken, JAGC, Captain Joseph P. Falcone, JAGC (on brief).

Before ADAMKEWICZ, MYERS and SMITH, Appellate Military Judges.

OPINION OF THE COURT

ADAMKEWICZ, Senior Judge:

Contrary to his pleas, appellant was convicted of rape, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (1982) [hereinafter UCMJ]. Appellant was sentenced to a dishonorable discharge, confinement for seven years, forfeiture of $405.60 pay per month for 84 months, and reduction to Private E1. The covening authority reduced the forfeitures to $405.00 pay per month for 84 months and approved the remainder of the adjudged sentence and the forfeitures as reduced.

Appellant alleges that his statement admitting his involvement in the rape was obtained in violation of his fifth amendment right to counsel under *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), and that the military judge erred by admitting the statement into evidence. We disagree.

On the morning of 12 September 1987, appellant and other suspects to a rape that occurred the night before were apprehended. After some preliminary processing, appellant was warned of his rights and questioned about the rape. At that time, appellant waived his rights and denied any role in the crime. Appellant was then released.

Later that day, appellant was apprehended a second time after another suspect implicated him in the rape. While at the Criminal Investigation Command's [hereinafter CID] office, appellant was introduced to Captain S, the command prosecutor at Ford Ord. Before appellant was interviewed for the second time, appellant requested to speak to Captain S in private. Whether appellant's request came before or after he was advised of his Article 31(b), UCMJ, rights was disputed at trial. Captain S talked with appellant briefly and told him that she could not give him any advice because she was a prosecuting attorney. Appellant was then interviewed and made an inculpatory statement to the CID investigator. After holding a hearing, the military judge denied appellant's motion to suppress his statement on constitutional grounds.

On appeal, appellant argues that his request to speak privately with Captain S amounted to an unequivocal request for the assistance of a defense counsel under the fifth amendment and *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880.[1] Thus, appellant claims that any statement taken from him following his request for a lawyer should be suppressed. We, however, do not view appellant's request to speak with Captain S as a bar to further interrogation without counsel.

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[1] In *Edwards*, the Supreme Court held that police officials may not ask further questions of a suspect who has requested counsel until a lawyer has been provided, unless the suspect himself initiates further communications with them.

In this case, appellant requested to speak with Captain S who had been introduced to him as the prosecutor for the government. His request was honored by the investigators. Appellant then without objection or additional requests proceeded with the CID interview. Appellant's request was limited and will not be broadly interpreted as an invocation of the right to counsel.

The mere fact that appellant requested to speak to someone who happened to be a lawyer does not necessarily amount to an assertion of the right to counsel. *Cf. United States v. Whitehead,* 26 M.J. 613, 617 (A.C.M.R.1988) (The court declined to adopt the position that "all questioning must cease once a suspect mentions the word 'counsel' or 'attorney.' "). Appellant's "unambiguous limited request for counsel is to be construed according to its plain meaning." *Id.* at 618 (citing *Connecticut v. Barrett,* 479 U.S. 523, 107 S.Ct. 828, 832, 93 L.Ed.2d 920 (1987)). Here, appellant's request was not ambiguous, but clear and concise. On direct examination, during an Article 39(a), UCMJ, session, appellant was asked by his counsel if appellant had asked to speak to an attorney. Appellant responded "[t]hat was just to speak to Capain [S], sir."

In *Connecticut v. Barrett,* the Supreme Court held that the defendant who agreed to talk with investigators but refused to make a written statement without an attorney present was not deemed to have invoked his right to counsel as to his oral statements. That Court refused to construe the defendant's limited invocation of his right to counsel to written statements as an invocation of his right to counsel for all purposes, especially where the defendant testified that he fully understood his rights and demonstrated a willingness to talk. The Supreme Court specifically refused to disregard the plain meaning of the defendant's unambiguous statement. *Connecticut v. Barrett,* 479 U.S. at 529-530, 107 S.Ct. at 832.

Here, appellant did not make a request for a lawyer or to stop the questioning once he spoke with Captain S. While in custody earlier that day, appellant was advised to his Article

31(b), UCMJ, rights. He was also advised of his rights a second time either before or immediately after his request to speak to Captain S. Appellant indicated during the Article 39(a), UCMJ, session that when he was advised of his rights the first time that day, he understood at that time he had a right to a defense lawyer.[2] At the time appellant made the request to talk with Captain S, he knew and understood that he had the right to an attorney to assist him but appellant specifically asked to talk to Captain S, the command prosecutor. Thereafter, appellant was re-advised of his rights to counsel.[3] At the second interview, appellant never exhibited

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[2] Appellant also testified at the Article 39(a) session that he had a conversation with Captain S while in custody of the CID agent the first time. Appellant acknowledged that from this prior conversation he knew that Captain S was a lawyer but could not recall any mention of her being a prosecutor for the government. However, we are satisfied from the record that CPT S was introduced to the appellant as a prosecutor assisting the CID in its investigation.

[3] At trial, the military judge found as fact that appellant requested to speak with Captain S prior to being advised of his Article 31 rights a second time. On appeal, appellant disagrees with the military judge's findings and argues that appellant requested to speak to Captain S after he was advised of his rights. Unfortunately, Captain S chose not to recuse herself from her role as trial counsel and thus, did not testify. *See generally, United States v. Baca*, 27 M.J. 110 (C.M.A.1988); Dep't of Army Pam 27-26, Rules of Professional Conduct for Lawyers, Rule 3-7 (31 Dec. 1987) (discussing counsel as a witness). The investigators present at the time of the request were unsure whether the request came before or after the rights advisement. Appellant, however, testified he talked to Captain S before the rights advisement. Although the question whether appellant was advised of his rights before or after his request to speak with Captain S is not controlling in light of our disposition of the issue in this case, we find support in the record for the trial judge's findings of fact that appellant requested to speak to Captain S before he was advised of his rights a second time. If appellant's request had been construed as an unlimited request "for counsel," we believe, contrary to the government's brief, that the request would have been an invocation of his right to counsel under the Fifth Amendment and would have precluded further interrogation even though it occurred before the rights advisement. *United States v. Goodson*, 22 M.J. 22 (C.M.A.1986), *remanded*, 22 M.J. 947 (A.C.M.R.1986) (accused's request for a lawyer prior to the interview but while being "processed" at the military police station amounted

an unwillingness to talk to the investigator. There is no evidence to indicate that Captain S or the CID investigators misled appellant about the desirability of retaining a lawyer or attempted to persuade appellant to waive his right to counsel. *Cf. United States v. Fouche*, 833 F.2d 1284, 1288 (9th Cir.1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988) (statement held admissible even though obtained after accused asked investigator about retaining a lawyer and the investigator responded that he was not a lawyer and would not give advice). When Captain S refused to assist him, appellant was not precluded from requesting "another" lawyer who could advise him. Appellant clearly knew he had a right to his own attorney but he elected to go it alone. He never expressed the desire to communicate with police authorities only through counsel. *See Edwards v. Arizona*, 451 U.S. at 484-85, 101 S.Ct. at 1884-85. *See also Arizona v. Roberson*, ___ U.S. ___, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988) (assertion of counsel right raises a presumption that suspect is unable to proceed without the assistance of counsel).

It is irrelevant that appellant's desire to talk to a prosecutor may have been illogical. *Cf. Connecticut v. Barrett*, 479 U.S. at 530, 107 S.Ct. at 833 (a suspect who agrees to talk but refuses to sign a statement without counsel does not invoke his right to counsel as to the oral statement). In this case, appellant's remarks were not an ambiguous request for counsel requiring clarification. *See Smith v. Illinois*, 469 U.S. 91, 96 n. 3, 105 S.Ct. 490, 493 n. 3, 83 L.Ed.2d 488 (1984); *United States v. Whitehead*, 26 M.J. at 617. Our recent holding in *United States v. Whitehead* that "a limited request need not be interpreted by police officials as an unlimited assertion for representation by counsel" applies with equal vigor here. *United States v. Whitehead*, 26 M.J. at 618. In short, we

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to a request for an attorney under the Fifth Amendment). In any event, there is no disagreement that the appellant had been advised of his right to have counsel provided at the earlier interrogation session that day and that he was aware of his rights to counsel when he asked to speak to Captain S.

believe that a request by a suspect to speak to a prosecuting attorney is not an assertion of the *Miranda*[4] rights thereby precluding further interrogation under *Edwards v. Arizona.*

We are satisfied that appellant was fully warned of his rights and that his waiver of his right to counsel was knowing and intelligent as well as voluntary. We do not accept the theory that appellant must understand and know every possible consequence of waiver of the Fifth Amendment right to counsel before waiver of that right is deemed effective. *Connecticut v. Barrett*, 479 U.S. at 530, 107 S.Ct. at 833; *Colorado v. Spring*, 479 U.S. 564, 107 S.Ct. 851, 857, 93 L.Ed.2d 954 (1987); *Oregon v. Elstad*, 470 U.S. 298, 316, 105 S.Ct. 1285, 1297, 84 L.Ed.2d 222 (1985). The standard warnings used in military practice, in an ordinary case, provide a suspect with a sufficient basis for making a valid waiver of his or her right to counsel. The military judge did not err in admitting the statement.

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are affirmed.

Judge MYERS and Judge SMITH concur.

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[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). *United States v. Tempia*, 37 C.M.R. 249 (C.M.A.1967), guarantees the same counsel rights to a military accused. *See also United States v. Applewhite*, 23 M.J. 196 (C.M.A.1987) (once an accused invokes his right to counsel, he will not be subject to further interrogation until counsel is made available or the accused initiates further communication).

☆ U.S. GOVERNMENT PRINTING OFFICE 1989—235-250/62060

Supreme Court, U.S.
FILED
JUN 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

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OCTOBER TERM, 1988

KEVIN L. BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether law enforcement officers may question a suspect about a crime after the suspect has asked to speak to the prosecutor.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1782

KEVIN L. BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the Court of Military Appeals affirming petitioner's conviction (Pet. App. 1a) is not yet reported. The opinion of the Army Court of Military Review (Pet. App. 2a-7a) is reported at 27 M.J. 614.

JURISDICTION

The judgment of the Court of Military Appeals was entered on March 9, 1989. The petition for a writ of certiorari was filed on May 4, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1987).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Fort Ord, California. He was convicted of rape, in violation of Article 120 of the

Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920. He was sentenced to seven years' imprisonment, a dishonorable discharge, forfeiture of part of his pay, and a reduction in rank. The convening authority approved the findings and sentence, but slightly reduced the forfeiture of pay. The Army Court of Military Review affirmed the findings and sentence. Upon discretionary review, the Court of Military Appeals affirmed.

1. On the evening of September 11, 1987, Ingrid Reed, the wife of a soldier assigned overseas, attended a party at a friend's home at Fort Ord, California. Tr. 212-213. Several male soldiers, including petitioner, also attended the party. Tr. 213, 439. Reed had several alcoholic drinks during the evening and eventually passed out. Tr. 216, 217. Some friends carried her to a back bedroom. Tr. 174-175, 249. When she awoke, she was not wearing any clothes, and she was in a dark room. Tr. 217. Passing in and out of consciousness, she felt two or three persons lying on top of her in succession, she saw a penis, and she felt like she was having intercourse. Tr. 218-219, 233, 242-243. At one point, someone hit Reed in the face and told her to "lay still bitch." Tr. 219. Reed remembered running from the house wrapped in a sheet and passing out at her home. Tr. 220. A friend called an ambulance, and after she received medical treatment, Reed reported the incident to an Army Criminal Investigation Division (CID) agent. *Ibid.*

2. Petitioner and several other suspects were apprehended on September 12, 1987. CID Special Agent Zimmerman fully advised petitioner of his rights under Article 31(b) of the UCMJ, 10 U.S.C. 831(b), and *Miranda* v. *Arizona,* 384 U.S. 436 (1966). Petitioner waived those rights, Tr. 301, and he executed a standard waiver-of-rights form, GX 10. In a sworn statement, petitioner admitted that he was at the party and that he went to the

bedroom with another woman to "check on" Reed, but petitioner denied having sex with Reed. GX 11. Petitioner was then released.

Approximately four hours later, petitioner was apprehended a second time after another suspect implicated petitioner in the rape. Tr. 43, 46. Special Agent Gunther met with petitioner in an interview room at the CID office and introduced petitioner to Captain Mary Spiece, a prosecuting attorney. Agent Gunther told petitioner: "This is a prosecutor for the United States Army. She's here assisting the CID in this investigation." Tr. 62; see Tr. 58, 167. Petitioner asked to talk to Captain Spiece in private. Tr. 51, 63, 315-318. Agents Gunther and Zimmerman left the room. Captain Spiece told petitioner that she could not advise him, that she was a prosecutor, and that "he could talk to a lawyer but it could not be her." Tr. 51, 63, 89, 317-318. After 10 to 20 seconds Captain Spiece left the room and related what she had told petitioner. Tr. 63. Agent Gunther then fully advised petitioner of his Article 31(b) and *Miranda* rights. Tr. 56, 84, 85, 89. Petitioner waived those rights, Tr. 44, and executed another standard rights waiver form, GX 1. In a sworn statement, petitioner admitted to unclothing and having sexual intercourse with Reed while she was unconscious and to watching another soldier have sexual intercourse with her. GX 2. Petitioner did not ask to speak with a lawyer during the questioning. Tr. 166.

3. Before trial, petitioner moved to suppress his confession. Petitioner alleged, among other things, that his waiver was invalid. Petitioner argued that his request to speak to Captain Spiece was an invocation of his right to counsel and that Agent Gunther therefore violated *Edwards* v. *Arizona,* 451 U.S. 477 (1981), when he subsequently questioned petitioner. Tr. 100-101. After an evidentiary hearing, the trial judge denied the motion.

Tr. 103-105. The judge found that petitioner's request to speak to Captain Spiece was not an invocation of the right to counsel and that the request therefore did not preclude the subsequent interrogation by Agent Gunther. Tr. 103-104. At trial, petitioner testified and recanted his confession. He claimed that his confession was the product of intoxication and confusion. Tr. 438-445, 457-458.[1]

4. The Army Court of Military Review affirmed. Pet. App. 2a-7a. The court observed that the "mere fact that [petitioner] requested to speak to someone who happened to be a lawyer does not necessarily amount to an assertion of the right to counsel." *Id.* at 4a (citation omitted). The court found that petitioner's request to speak to Captain Spiece was not a request for counsel, but was simply a re-

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[1] Other evidence aside from petitioner's confession linked him to the rape. Petitioner told Specialist Kevin Angelo, who was also at the party, that " 'we were messing with this German chick,' " Tr. 180, and petitioner attempted to persuade Angelo to go to the back of the house, Tr. 180-181, where Reed was lying unconscious, Tr. 174-175, 249. Angelo later saw a man, whom he could not identify as petitioner, in the room with a woman. The man removed a blanket from the woman and touched her while she was in a fetal position. The woman attempted to kick the man. Tr. 183-185, 191-193. Reed also remembered attempting to kick someone while she was lying down, Tr. 221, 231, although Reed could not identify petitioner as being at the party. Tr. 236. A physical examination of Reed after the incident revealed the presence of sperm in her vaginal tract. Tr. 207-208. Finally, a forensic examination revealed that petitioner (and four other suspects) had blood type O; that Reed had blood type A; that both petitioner and Reed were "secretors" (*i.e.*, their blood type can be discovered from testing other bodily fluids); that petitioner's trousers revealed the presence of blood types O and A in the groin area; that swabbings of Reed's vaginal area revealed the presence of semen with blood type O; and that petitioner's trousers revealed the presence of vomitus consistent with Reed's blood type (the evidence showed that Reed vomited after being placed in the back room, Tr. 250). Tr. 389-391, 397-399.

quest to speak to the prosecuting attorney. The court noted that petitioner understood that he had a right to a defense lawyer, but that petitioner "specifically asked to talk to Captain S[piece], the command prosecutor." *Id.* at 5a. Petitioner "never exhibited an unwillingness to talk to the investigator," the court found, *id.* at 5a-6a, and there was "no evidence to indicate that Captain S[piece] or the CID investigators misled [petitioner] about the desirability of retaining a lawyer or attempted to persuade [petitioner] to waive his right to counsel." *Id.* at 6a (citation omitted). The court of military review held, therefore, that petitioner's request to speak to the prosecutor did not trigger the rule of *Edwards* v. *Arizona, supra,* and did not bar the subsequent questioning by Agent Gunther. Pet. App. 6a-7a.[2]

The Court of Military Appeals summarily affirmed. Pet. App. 1a.

ARGUMENT

Petitioner contends that his request to speak to the prosecutor triggered the rule of *Edwards* v. *Arizona, supra,* and barred any subsequent questioning. All three courts below properly rejected that claim. As those courts correctly recognized, a suspect's remarks while in custody should be given their ordinary meaning, and petitioner's request to speak with a person whom he knew to be the prosecutor did not constitute an invocation of his right to counsel. That determination does not merit review by this Court.

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[2] The court also agreed with the trial judge's finding that petitioner's waiver was knowing, intelligent, and voluntary, and the court concluded that petitioner's confession was properly admitted into evidence. Pet. App. 7a. Petitioner has not separately challenged that ruling in this Court.

Miranda requires law enforcement officers to inform a suspect in custody that he has the right to consult with a lawyer before or during custodial interrogation. 384 U.S. at 471. If the suspect asks to speak with a lawyer, *Edwards* prohibits further custodial interrogation of the suspect until counsel has been made available to him or he initiates further communication, exchanges, or conversations with the police. 451 U.S. at 485. The rationale for that "bright-line prohibition," the Court has explained, is to prevent the police from engaging in the type of " 'badger[ing]' or 'overreaching' " that might "wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984) (citations omitted).

Petitioner contends that the bright-line rule adopted in *Edwards* applies to this case, because his request to speak with Captain Spiece was tantamount to an expression of his intention to deal with the authorities only through counsel. That claim lacks merit because, as the court of military review found, petitioner was told that Captain Spiece was the prosecuting attorney. Pet. App. 5a n.2. Captain Spiece was introduced to petitioner as the prosecutor who was "assisting the CID in this investigation," Tr. 62, and petitioner was therefore on notice that the captain was "allied" with the CID officials. *Fare* v. *Michael C.*, 442 U.S. 707, 720 (1979).

To be sure, petitioner asked to speak with Captain Spiece "as a lawyer." Tr. 51. But putting the request that way did not convert petitioner's request to speak to the prosecutor into an invocation of the right to counsel. While he may have wanted to call on Captain Spiece's legal expertise to help determine the strength of the case against him or the intentions of the prosecution, a request for ad-

vice of that kind from the prosecution is wholly different from a request to deal with the prosecution through one's own counsel.

Contrary to petitioner's contention, his request to speak to Captain Spiece was not an "ambiguous" request for counsel, Pet. 7, but was a "clear and concise" statement of his desire to talk to the prosecutor, as the court of military review found. Pet. App. 4a. Far from expressing a "desire to deal with the police only through counsel," *Edwards*, 451 U.S. at 484, petitioner asked to speak to the prosecuting attorney.[3] The ordinary meaning of petitioner's straightforward request was therefore clear. Cf. *Connecticut* v. *Barrett*, 479 U.S. 523, 529 (1987) ("Interpretation [of a suspect's request for counsel] is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous."). Any doubt about whether petitioner wanted to speak to a lawyer vanishes in light of the fact that moments later petitioner waived his right to counsel after he was specifically advised that he had a right to consult with a lawyer "before, during and after questioning." GX 1, para. 3. In fact, petitioner agreed during his testimony at the suppression hearing that he "understood that [he] had a right to [a] defense lawyer" after he was so advised by the CID agent. Tr. 93. Under these circumstances, petitioner did not invoke his right to counsel, and the *Edwards* rule was never triggered.

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[3] Petitioner made that point in his testimony during the suppression hearing. Asked by his counsel whether he had "asked to speak to an attorney at one time that evening," petitioner responded "[t]hat was just to speak to Captain Spiece, sir." Tr. 86. Petitioner reinforced that point during trial when he testified about his conversation with Captain Spiece. Petitioner testified that "she stated that she was a prosecutor or a lawyer, something like that state of nature and she wouldn't be able to help and I—and I asked her—I still wanted to talk with her." Tr. 445.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JUNE 1989

U.S. GOVERNMENT PRINTING OFFICE 1989—241 699 00281